Supreme Court, U.S.
FILED
SEP 25 1998
OFFICE OF THE CLERK

No. 98-173

In the Supreme Court of the United States

OCTOBER TERM, 1998

ADVENTURE RESOURCES, INC.,
Petitioner,
v.
MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, PAUL R. DEAN, TRUSTEES OF THE UMWA 1950 PENSION TRUST AND THE UMWA 1974 PENSION TRUST, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENTS THE UMWA 1950 AND 1974 PENSION TRUSTS AND THEIR TRUSTEES IN OPPOSITION

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25 pp

QUESTION PRESENTED

Petitioner, a debtor under the Bankruptcy Code, owes payments to a pension fund under a collective bargaining agreement. The court of appeals held that petitioner assumed the collective bargaining agreement during its bankruptcy and therefore that the payments owed are administrative expenses entitled to priority in the bankruptcy case. The question presented is:

Whether the court of appeals correctly concluded, under Section 365 of the Bankruptcy Code and this Court's decision in *NLRB v. Bildisco & Bildisco,* 465 U.S. 513 (1984), that the amounts owed by petitioner to the pension fund are entitled to priority as administrative expenses in petitioner's bankruptcy proceeding.

LIST OF PARTIES

In addition to petitioner, the following parties were appellees and cross-appellants in the court of appeals: Amigo Smokeless Coal Company; Tommy Creek Coal Company; Green Mountain Energy, Incorporated; M.A.E. Services, Incorporated; Maben Energy Corporation; Raleigh Leasing, Incorporated; Stoney Coal Company; Spruce Laurel Coal Company; Hawley Coal Mining Corporation; Bickford Mining, Incorporated; Barrett Fuel Corporation; East Gulf Fuel Corporation; Coal X Equipment & Supply Company, Incorporated; Beckley Repair & Hydraulic Service, Incorporated; Halfway, Incorporated; Chesapeake Leasing, Incorporated; Piney Fuel Corporation; Lakeside Leasing, Incorporated; Raleigh Services, Incorporated; Atlas Coal Leasing, Incorporated; Sugar Camp Mining, Incorporated; H.D. Enterprises, Limited; Jet Coal Services, Incorporated; Microblack Incorporated; Dover Coal Sales, Incorporated; No. 10 Mining Incorporated; and Panther Red Ash Land Company, Incorporated.

In addition to the respondents listed in the caption, the following parties were appellants and cross-appellees in the court of appeals: United Mine Workers of America Combined Benefit Fund; Michael H. Holland, Marty D. Hudson, Elliot A. Segal, Thomas O.S. Rand, Carlton R. Sickles, Gail R. Wilensky, and William P. Hobgood, as Trustees of the United Mine Workers of America Combined Benefit Fund; United Mine Workers of America 1992 Benefit Plan; Michael H. Holland, Marty D. Hudson, Thomas F. Connors, and Robert D. Wallace, as Trustees of the UMWA 1992 Benefit Plan; United Mine Workers 1993 Benefit Plan; Michael H. Holland, Marty D. Hudson, Thomas F. Connors, and Elliot A. Segal, as Trustees of the UMWA 1993 Benefit Plan; United Mine Workers of America Cash Deferred Savings Plan of 1988; and, Michael H. Holland, Marty D. Hudson, Elliot A. Segal, and Joseph J. Stahl, II, as Trustees of the UMWA Cash Deferred Savings Plan of 1988.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A30) is reported at 137 F.3d 786. The order of the court of appeals denying the petition for rehearing and suggestion of rehearing en banc (Pet. App. A55-A60) is unreported. The opinion of the district court (Pet. App. A31-A54) is reported at 193 B.R. 787.

STATUTES INVOLVED

This case concerns Sections 365, 503, 507, and 1113 of the Bankruptcy Code. 11 U.S.C. §§ 365, 503, 507, and 1113. These provisions are reproduced at Pet. App. A61-A89.

STATEMENT OF THE CASE

Petitioner fails to inform the Court of many of the important facts that support the court of appeals' decision. Having omitted those facts, petitioner then mischaracterizes the court of appeals' ruling and attributes to that decision a legal proposition that the court of appeals did not in fact adopt. Indeed, none of the three interrelated grounds for review advanced by petitioner is actually presented. The court of appeals did not, as petitioner asserts, establish a new class of priority claims in bankruptcy. The decision does not, as petitioner argues, create a conflict among the circuits. And the decision will not, as petitioner predicts, disrupt the administration of cases under the Bankruptcy Code or accord unfair treatment to any class of creditors.

Under this Court's decision in *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 521-22 (1984), collective bargaining agreements are "executory contracts" subject to assumption or rejection in bankruptcy. The court of appeals ruled that petitioner, during its bankruptcy, assumed the National Bituminous Coal Wage Agreement of 1988. Under Section 365 of the Bankruptcy Code, if an executory contract is assumed, all amounts due under that contract are entitled to priority as administrative expenses. Accordingly, the court of appeals held that the claims at issue are entitled to priority. In reaching its decision, the court of appeals merely applied two correctly-stated and uncontroversial propositions of law to the circumstances of this case. Petitioner does not dispute that collective bargaining agreements are "executory contracts" or that amounts due under an assumed executory contract are

entitled to administrative priority. Rather, petitioner disagrees with the court's ruling that, under the facts presented here, petitioner assumed the applicable executory contract. That ruling does not warrant further review.

A. Background

Petitioner Adventure Resources, Inc. and certain of its affiliated companies (collectively, "Adventure") are debtors in bankruptcy.[1] Adventure was a party to several collective bargaining agreements with the United Mine Workers of America (the "UMWA"). Under those collective bargaining agreements (referred to as "National Bituminous Coal Wage Agreements" or "NBCWAs"), Adventure was obligated to make contributions, at specified rates, to certain trust funds established to provide retirement and health benefits to coal miners and their families. This group of pension and health funds is known collectively as the UMWA Health and Retirement Funds (the "Funds").[2] Adventure's petition for certiorari focuses

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[1] Petitioner Adventure Resources, Inc. owns or is affiliated with twenty-seven other companies. The other companies are: Amigo Smokeless Coal Co.; Tommy Creek Coal Co.; Green Mountain Energy, Inc.; M.A.E. Services, Inc.; Maben Energy Corp.; Raleigh Leasing, Inc.; Stoney Coal Co.; Spruce Laurel Coal Co.; Hawley Coal Mining Corp.; Bickford Mining, Inc.; Barrett Fuel Corp.; East Gulf Fuel Corp.; Coal X Equipment & Supply Company, Inc.; Beckley Repair & Hydraulic Service, Inc.; Halfway, Inc.; Chesapeake Leasing, Inc.; Piney Fuel Corp.; Lakeside Leasing, Inc.; Raleigh Services, Inc.; Atlas Coal Leasing, Inc.; Sugar Camp Mining, Inc.; H.D. Enterprises, Ltd.; Jet Coal Services, Inc.; Microblack, Inc.; Dover Coal Sales, Inc.; No. 10 Mining Inc.; and Panther Red Ash Land Company, Inc. All of these companies were parties in the courts below.

[2] The Funds include: the United Mine Workers of America 1950 Pension Plan (the "1950 Pension Plan"); the United Mine Workers of America 1974 Pension Plan (the "1974 Pension Plan"); the United Mine Workers of America 1950 Benefit Plan (the "1950 Benefit Plan"); the United Mine Workers of America 1974 Benefit Plan (the "1974 Benefit Plan"); the United Mine Workers of America Cash Deferred Savings Plan of 1988 (the "1988 Cash

on only two of the Funds, the 1950 Pension Plan and the 1974 Pension Plan.[3] The case concerns the amounts that Adventure was obligated to pay, but did not pay, to the pension plans under the 1988 NBCWA.[4]

Adventure, a group of coal mining companies, was owned by H. Paul Kizer.[5] In the mid-1980s, Mr. Kizer began expanding Adventure's mining operations. He chose to finance the expansion by illegally withholding payments that Adventure should have been making to the Funds:

> In 1985 and a portion of 1986, the companies began extensive mine development . . . . Management felt that expanding vendor credit beyond the level being

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Deferred Savings Plan"); and the United Mine Workers of America 1993 Benefit Plan (the "1993 Benefit Plan"). The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 (the "Coal Act") merged the 1950 and 1974 Benefit Plans into the UMWA Combined Benefit Fund. An additional fund, the UMWA 1992 Benefit Plan, also was created under the Coal Act.

[3] The district court's decision also addressed the priority of claims asserted by the UMWA Combined Benefit Fund and the UMWA 1992 Benefit Plan under the Coal Act. Adventure appealed that portion of the district court's ruling, and the court of appeals affirmed. Adventure has not sought further review of that aspect of the court of appeals' decision.

[4] Although Adventure's petition refers to both pension plans, Adventure in fact owes contributions under the 1988 NBCWA only to the 1974 Pension Plan. That is because, during the term of the 1988 NBCWA, the 1950 Pension Plan was fully funded, and, accordingly, the contractually prescribed contribution rate for the 1950 Pension Plan was $0.00 for each hour of classified work under the agreement. Because the petition refers to both pension trusts, however, we follow the same convention here.

[5] This case marks the third time the Funds have been forced to use legal process to attempt to compel Mr. Kizer to comply with his obligations under the NBCWAs. *See Connors v. Adventure Resources, Inc.*, No. 5:90-0209 (S.D. W. Va. Nov. 8, 1991) (ordering Mr. Kizer's companies to pay delinquent contributions); *Blevins v. Maben Energy Corp.*, No. 5:89-0875 (S.D. W. Va. Oct. 26, 1992) (ordering Mr. Kizer's companies to reimburse one of the Funds for medical benefit payments).

> used at the time was impossible and sought other sources of funds. The decision was made not to make payments, as due, to the mineworkers pension and benefit funds and to temporarily defer payment of West Virginia Business and Occupation taxes.

Pet. App. A10. Kizer's expansion strategy eventually failed, however, and from December 1992 through May 1993, the Adventure companies filed for protection under the Bankruptcy Code.[6] Pet. App. A8.

Adventure signed NBCWAs with the UMWA from 1974 forward. Pet. App. A9, A10, n.2. When Adventure filed for bankruptcy in December 1992, the 1988 NBCWA remained in effect; the term of the agreement was five years, and it was scheduled to terminate on February 1, 1993. Early in its bankruptcy, Adventure negotiated with the UMWA for two extensions of the 1988 NBCWA, and asked the bankruptcy court to approve those extensions. *See* Motion of Debtors for Authority to Extend Collective Bargaining Agreement. Adventure and the UMWA ultimately agreed to extend the term of the 1988 NBCWA until September 1993. *See*

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[6] Prior to filing for bankruptcy, Adventure ceased providing health benefits to approximately 57 pensioners from Adventure companies that were shut down. *Blevins v. Maben Energy Corp*, No. 5:89-9875 (S.D. W. Va. Oct. 26, 1992). The UMWA and a number of pensioners sued several of the Adventure companies and the 1974 Benefit Plan. The 1974 Benefit Plan was ordered to provide benefits during the pendency of the suit. The 1974 Benefit Plan consequently incurred costs totaling approximately $860,000 for medical claims of the beneficiaries during that interval. The district court eventually ruled that the beneficiaries always had belonged in the Adventure medical plan, because the corporate defendants were alter egos and constituted a single employer liable for providing the benefits. The *Blevins* court specifically noted that the Adventure companies acted "with the expectation, if not the intention, to pass the obligations owed to their pensioners to the 1974 Benefit Trust." *Id.* at 4-5. The court directed Adventure to reimburse the 1974 Benefit Plan for the benefits that were paid to Adventure's pensioners during the pendency of the *Blevins* litigation. Adventure never complied.

Order Allowing Withdrawal of Second Motion to Extend Collective Bargaining Agreement. During this period, Adventure was bound to the terms and conditions of the 1988 NBCWA and reaped the benefits of that contract. Pet. App. A14.

In early 1994, Adventure sought and obtained bankruptcy court approval to sign the 1993 NBCWA, the relevant terms of which regarding the 1950 and 1974 Pension Plans were substantially similar to those of the 1988 NBCWA. *See* Motion of Debtors for Approval of Authority to Enter Into Collective Bargaining Agreement with United Mine Workers of America. Later, in early February 1995, Adventure renegotiated some of the terms and conditions of the 1993 NBCWA, obtaining concessions on wages and benefits paid to current employees. Adventure again sought and obtained bankruptcy court approval for those modifications. *See* Motion of Debtors for Authorization to Implement Interim Changes in Collective Bargaining Agreement. None of the modifications related to Adventure's obligations to any of the Funds. *Id.*

Notwithstanding its repeated reaffirmations of its obligations under successive NBCWAs, and despite obtaining all of the consideration provided to employers under the NBCWAs, Adventure failed to pay pension and benefit plan contributions as required by its collective bargaining agreements for years prior to its bankruptcy, and throughout the bankruptcy proceedings. In total, Adventure owes the Funds more than $20 million, of which approximately $640,000 is at issue here.

B. Procedural History

On December 13, 1993, Adventure filed an adversary proceeding in the bankruptcy court seeking, among other things, determination of the priority of various claims asserted by the Funds. Pet. App. A11. On the Funds' motion, the district court withdrew its reference to the bankruptcy court. *Id.* The district court ruled that claims

under the 1988 NBCWA that were due at the time Adventure filed for bankruptcy are not entitled to administrative expense priority. Pet. App. A12. The Funds appealed.[7]

The court of appeals reversed. The court held that Adventure's obligations under the 1988 NBCWA are entitled to priority as administrative expenses. In explaining its decision, the court observed, following this Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 521-22 (1984), that a collective bargaining agreement is an "executory contract" under Section 365 of the Bankruptcy Code. Pet. App. A26. An executory contract is subject to assumption or rejection in bankruptcy. 11 U.S.C. § 365. Section 1113 of the Bankruptcy Code governs the procedure under which a collective bargaining agreement may be rejected or modified. 11 U.S.C. § 1113. These propositions of law are well-settled and uncontroversial, and Adventure does not dispute them. Pet. 8.

The court of appeals ruled that, under the circumstances of this case, Adventure had assumed the 1988 NBCWA. The court noted, and Adventure does not deny, that "Adventure never sought to reject or modify its labor agreement with the UMWA in accordance with § 1113." Pet. App. A22. To the contrary, the court stated, Adventure assumed its obligations under the 1988 collective bargaining agreement, including its obligation to make contributions to the Funds. Pet. App. A29. This holding is well-supported, given that Adventure continued to benefit from the 1988 NBCWA during its bankruptcy, sought bankruptcy court approval to extend the term of the 1988 NBCWA, and then obtained bankruptcy court approval to sign the successor 1993 NBCWA.

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[7] After the notice of appeal was filed, but before this case was briefed by the parties, Adventure's bankruptcy case was converted to a Chapter 7 liquidation. The conversion does not affect the disposition of this case.

The court of appeals held that, because the 1988 NBCWA is an executory contract, and because Adventure assumed its obligations under the 1988 NBCWA, then under Section 365 of the Bankruptcy Code Adventure is required to cure any pre-petition breach of that agreement, including those concerning its payment obligations to the Funds. Pet. App. A29; 11 U.S.C. § 365. When a debtor assumes an executory contract, it does so *cum onere*, and the expenses and liabilities that have accrued under that contract are classified as administrative expenses. *Bildisco*, 465 U.S. at 531. This proposition of law also is well-settled and uncontroversial, and Adventure does not contest it. Pet. 15. The court of appeals therefore concluded that

> when Adventure assumed the collective bargaining agreement, it undertook a legal obligation to cure its existing defaults under that agreement, including the arrears to the Pension Trusts. Adventure's failure to comply with its legal obligation gave rise, under *Bildisco* and *Stewart Foods*, to an administrative expense claim on behalf of the Pension Trusts for the entirety of the arrearage.

Pet. App. A29.[8]

ARGUMENT

The court of appeals reached the correct result, and none of the three arguments advanced by Adventure demonstrates a need for further review. The ruling below involves the application of settled law to the circumstances of this case. Review should be denied.

Adventure's contention that the court of appeals misapplied Section 365 of the Bankruptcy Code in conclud-

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[8] *In re Stewart Foods, Inc.*, 64 F.3d 141, 145 (4th Cir. 1995). *See also In re Frontier Properties, Inc.*, 979 F.2d 1358, 1365 (9th Cir. 1992); *In re Pacific Express, Inc.*, 780 F.2d 1482, 1486 n.3 (9th Cir. 1986); *In re Airlift Int'l, Inc.*, 761 F.2d 1503, 1508 (11th Cir. 1985); *LJC Corp. v. Boyle*, 768 F.2d 1489, 1494 n.6 (D.C. Cir. 1985) (per curiam).

ing that Adventure assumed the 1988 NBCWA simply amounts to a disagreement with the application of the plain language of the statute to the particular facts of this case. As the court below observed, Adventure never rejected, or even attempted to reject, its obligations to the 1950 and 1974 Pension Plans. To the contrary, Adventure benefitted throughout its bankruptcy from its collective bargaining agreements with the UMWA. Adventure sought bankruptcy court approval to extend the term of the applicable collective bargaining agreement during its bankruptcy. Adventure sought and obtained bankruptcy court approval to sign a new collective bargaining agreement with the UMWA during its bankruptcy. Even when Adventure sought and obtained bankruptcy court approval to modify that successor agreement under Section 1113 of the Bankruptcy Code, it left its obligations to the pension trusts untouched. Under these circumstances, the court held that Adventure had assumed the contract. That Adventure disagrees with the court's conclusion does not provide an appropriate ground for further review.

Adventure's argument that the decision of the court of appeals conflicts with decisions from the Second and Third Circuits is incorrect. The Second and Third Circuits noted that the obligations at issue in *In re Roth American*, 975 F.2d 949 (3d Cir. 1992), and *In re Ionosphere Clubs, Inc.*, 22 F.3d 403 (2d Cir. 1994) ("*Ionosphere II*"), were rights of discharged employees to accrued vacation and severance pay. The courts noted that those obligations were not due and owing as of the commencement of the applicable bankruptcy in either case. The courts of appeals in *Roth American* and *Ionosphere II* concluded that the obligations at issue there would not have been entitled to priority regardless of whether the collective bargaining agreements in those cases were or were not assumed. The issue that the courts considered was whether claims for vacation and severance pay that accrued prior to the bankruptcy under an unrejected collective bargaining agreement were entitled to priority by

operation of Section 1113 of the Bankruptcy Code. Both courts relied solely on the language of Section 1113 of the Bankruptcy Code in reaching their decisions, and both determined that Section 1113 does not contain any direction concerning the priority to be accorded in bankruptcy distributions. Neither decision contains any analysis of priority arising from assumption of a collective bargaining agreement under Section 365 of the Bankruptcy Code.

The court of appeals in this case agreed with the reasoning of those courts. Pet. App. A24 ("[T]here is no indication either from the language or the legislative history of section 1113 that Congress intended to address the priority to be given claims based on a collective bargaining agreement.") (citing *Roth American*, 975 F.2d at 956). The court's holding that Adventure's obligations under the 1988 NBCWA are entitled to priority is based on the fact that in this case the applicable collective bargaining agreement was assumed, an issue not analyzed by the other courts. Contrary to Adventure's argument, the reasoning of the court of appeals is in accord with the decisions of the Second and Third Circuits. The court of appeals reached a result that is different from the results reached in *Roth American* and *Ionosphere II* because the obligations at issue here are not like the obligations considered in those cases. The contributions to the 1950 and 1974 Pension Plans at issue here were due and owing at the time of Adventure's bankruptcy filing. By contrast, the Second and Third Circuits, having determined that the unused vacation pay and severance pay obligations at issue in those cases were contingent at the time of the bankruptcy filings (because the employees involved were discharged only after the bankruptcy had begun), focused solely on Section 1113 of the Bankruptcy Code and did not analyze the application of Section 365 to the facts before them.

Adventure's assertion that the decision of the court of appeals will lead to unfairness in the administration of bankruptcy cases is inaccurate and does not justify further

review. The applicable law concerning the treatment of executory contracts in bankruptcy is well-known and unremarkable. Congress clearly has established the priority scheme for claims arising under executory contracts. Assumption of an executory contract gives rise to administrative claims for cure and ongoing performance; rejection creates a non-priority unsecured claim for damages. Pet. App. A28 n.17, A29 n.18. The court of appeals ruled that this debtor, after years of ignoring its obligations under its contracts with the UMWA while reaping all of the benefits of those contracts before and during its bankruptcy, after seeking bankruptcy court approval to extend its obligations under the 1988 NBCWA, after successfully negotiating such extensions with the UMWA, and after obtaining court approval to sign a successor collective bargaining agreement with the UMWA, had assumed the 1988 NBCWA. The decision is based on undisputed and uncontroversial principles of law and their application to the facts of this case. It does not, as Adventure suggests, establish a new rule of law, and review is not warranted.

I. REVIEW IS NOT WARRANTED BECAUSE THE COURT OF APPEALS CORRECTLY APPLIED UNCONTROVERTED PRINCIPLES OF LAW TO THE FACTS OF THIS CASE

Adventure seeks to persuade this Court to grant review by arguing that the court of appeals misapplied, misinterpreted, or broadened the application of the rules of priority under the Bankruptcy Code. Essentially, Adventure claims that the court of appeals effectively created a new priority in bankruptcy. To the contrary, however, the Fourth Circuit did nothing more than apply the plain language of Section 365 of the Bankruptcy Code to a collective bargaining agreement Adventure admits is an executory contract. Adventure's arguments are based on an artificial and improperly selective reading of the court of appeals' decision, and are wholly insufficient to warrant review.

Adventure claims that the question presented below was "whether pre-petition claims of the UMWA Funds may be moved to the head of the line for bankruptcy payment by being deemed administrative claims." Pet. 6. Adventure acknowledges, however, that, under the Bankruptcy Code and under this Court's decision in *Bildisco*, outstanding obligations under executory contracts that are assumed in bankruptcy *are* entitled to administrative treatment. The question, therefore, is whether Adventure assumed the 1988 NBCWA. If it did, Adventure's own statement of applicable legal principles requires that the past due amounts under that agreement be accorded priority status.

The court of appeals recognized that for many years Adventure deliberately failed to fulfill its obligations under the collective bargaining agreement with the UMWA, while at the same time Adventure obtained all of the benefits of that agreement. Pet. App. A9-A11, A14. After Adventure filed for bankruptcy, it went to the UMWA, negotiated for two extensions of the 1988 NBCWA, and went to the bankruptcy court to ask the court to extend the term of that agreement.[9] After availing itself of the labor of union employees and the auspices of the bankruptcy court, Adventure went again to the court and asked for permission to enter into the 1993 NBCWA, which was similar in all material respects to the 1988 agreement and which was the successor to the 1988 agreement. Adventure then sought and obtained further modifications to the 1993 NBCWA from the UMWA and approval from the bankruptcy court. Throughout all of

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[9] Adventure repeatedly states that the court of appeals "ignored the provisions of Section 365 that provide that agreements may only be assumed by an affirmative assumption by the debtor . . . ." Pet. 7. Adventure neither quotes nor cites any authority, however, that requires some particular action, and Section 365 contains no such provision. In any event, however, even if Adventure were correct, its conduct in asking the bankruptcy court to permit it to extend the 1988 NBCWA would constitute an affirmative act of assumption even without the later conduct of seeking court approval to enter into the successor agreement.

this, Adventure never sought a modification or rejection of that portion of either NBCWA that required funding contributions to the 1950 and 1974 Pension Plans.[10]

The court of appeals determined that Adventure had assumed the collective bargaining agreement. The facts of this case clearly support that determination.[11] Indeed, the court of appeals could have relied solely on the fact that, throughout the course of its bankruptcy, Adventure never rejected, or even attempted to reject, its obligations to the 1950 and 1974 Pension Plans.[12] *See* Pet. App.

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[10] Section 1113 outlines specific action that must be taken before a debtor can modify its obligations under a collective bargaining agreement. Although Adventure followed these procedures for rejection or modification with respect to some aspects of its participation in the coal industry's collective bargaining system, Adventure never requested any alteration in its obligations to the Funds.

[11] The court of appeals articulated the question presented on appeal as "whether a debtor in bankruptcy operating under the aegis of Chapter 11 may, with regard to an executory contract in effect at the time of the filing of the petition for reorganization, continue to reap the benefits of its bargain without concern that the non-debtor party will be made whole for the debtor's unfulfilled prepetition obligations." Pet. App. A8.

[12] Section 1113 requires full compliance with collectively bargained obligations unless and until the collective bargaining agreement is modified or terminated in accordance with the Bankruptcy Code's strict requirements. It is undisputed that Adventure never obtained permission to reject the 1988 NBCWA. *See also In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 990 (2d Cir. 1990), *cert. denied sub nom. Airline Pilots Ass'n v. Shugrue*, 502 U.S. 808 (1991) (*"Ionosphere I"*); *In re St. Louis Globe-Democrat, Inc.*, 86 B.R. 606, 609 (Bankr. E.D. Mo. 1988); *Eagle, Inc. v. Local 537 of United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Indus.*, No. 95-CV-10693-RGS, 1996 WL 407981 (D. Mass. Feb. 15, 1996); *In re Arlene's Sportswear, Inc.*, 140 B.R. 25, 26 (Bankr. D. Mass. 1992); *In re Canton Castings, Inc.*, 103 B.R. 874 (Bankr. N. D. Ohio 1989). A failure to pay wages and benefits in accordance with the collective bargaining agreement thus constitutes a breach of contract and a violation of Section 1113(f). 7 Lawrence P. King *et al., Collier on Bankruptcy* ¶ 1113.03 at 1113-11 (15th ed. 1998) (citations omitted).

A28 ("The collective bargaining agreement between the UMWA and Adventure was assumed in bankruptcy as a result of the latter's failure to reject it in accordance with § 1113.") (citing *Roth American*, 975 F.2d at 957). Thus, under the circumstances of this case, the claims of the 1950 and 1974 Pension Plans "are the proverbial round peg" that fits within the Bankruptcy Code's definition of "administrative expenses." Pet. App. A25. Adventure acknowledges that collective bargaining agreements are executory contracts that can be assumed. It acknowledges that assumption requires a cure of past due arrearages, and that the past due amounts are entitled to priority status in the bankruptcy. Pet. 15. Thus, having assumed its contract, Adventure's obligations thereunder are entitled to priority, as the court of appeals held.

II. REVIEW IS NOT WARRANTED BECAUSE THE COURT OF APPEALS' DECISION CREATES NO CONFLICT IN THE COURTS OF APPEALS

Adventure's claim that the court of appeals' decision conflicts with decisions of the Second and Third Circuits is also unavailing. The courts in *Ionosphere II* and *Roth American* decided that claims for vacation and severance pay under an unrejected collective bargaining agreement that are not due and owing at the commencement of the bankruptcy are not entitled to priority under Section 1113 of the Bankruptcy Code. The courts determined that the obligations at issue in those decisions would not have been entitled to priority, regardless of whether the collective bargaining agreements had been assumed. Accordingly, neither the Second nor the Third Circuit considered the question presented in this case.

The court of appeals cited with approval the decisions in *Roth American* and *Ionosphere II* for the proposition that Adventure's obligations to the 1950 and 1974 Pension Plans were not entitled to priority under Section 1113 of the Bankruptcy Code. Pet. App. A25. It went on to analyze, however, whether amounts owed to the 1950 and 1974 Pension Plans were entitled to priority under Sec-

tion 365 of the Bankruptcy Code, an issue not addressed in the other decisions.

In *Ionosphere II*, Eastern Airlines' employees claimed that they were owed more than $60 million in unused vacation pay that had been earned prior to the time that Eastern Airlines filed for bankruptcy. The Second Circuit was not presented with any argument that the contract had been assumed. Moreover, the Court in *Ionosphere II* specifically cited long-standing circuit precedent establishing that vacation pay claims are accorded administrative priority only to the extent that the vacation pay is attributable to work performed during the bankruptcy. 22 F.3d at 408. Accordingly, the Second Circuit considered only whether the vacation pay claims were entitled to priority under Section 1113 of the Bankruptcy Code. The court held that Section 1113 of the Bankruptcy Code did not, standing alone, elevate the claims for vacation pay to administrative expense status.

Similarly, in *Roth American*, employees contended that unused vacation and severance pay due under a collective bargaining agreement in effect at the time the bankruptcy began were entitled to administrative priority. The court ruled that the claims at issue were not entitled to priority under Section 365 of the Bankruptcy Code, even if the collective bargaining agreement had been assumed. 975 F.2d at 958. Accordingly, although the *Roth American* opinion makes reference to the "assumption" of the agreement at issue, whether the agreement had been assumed under Section 365 of the Bankruptcy Code was not germane to the Third Circuit's decision. Like the court of appeals in this case and the Second Circuit in *Ionosphere II*, the Third Circuit in *Roth American* concluded that Section 1113 of the Bankruptcy Code did not, standing alone, elevate the claims for vacation pay and severance pay to administrative expense status.

The Second Circuit, the Third Circuit, and the court of appeals in this case thus agree that Section 1113 does not automatically create administrative expense priority for amounts owed under a collective bargaining agreement without regard to whether the collective bargaining agreement has been assumed. This case, however, is different from *Ionosphere II* and *Roth American*. In this case, the court held that the collective bargaining agreement was assumed by Adventure, and the court relied on Section 365 of the Bankruptcy Code in determining the priority to be accorded amounts owed to the 1950 and 1974 Pension Plans. Moreover, unlike in *Roth American* and *Ionosphere II*, the obligations at issue in this case are not claims for vacation and severance pay earned before the bankruptcy, but are mandatory contributions to pension funds that were due and owing at the time Adventure filed its bankruptcy. As set forth above, there is no disagreement among the circuits with this Court's pronouncement in *Bildisco* that all amounts due under an assumed collective bargaining agreement are entitled to administrative priority under Section 365 of the Bankruptcy Code. Accordingly, the court of appeals held, quite unremarkably, that because Adventure had assumed the 1988 NBCWA, the claims at issue are entitled to administrative priority under Section 365 of the Bankruptcy Code.[13]

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[13] Although Adventure does not argue that the decision below conflicts with the Sixth Circuit's ruling in *In re Unimet Corp.*, 842 F.2d 879 (6th Cir.), *cert. denied*, 488 U.S. 828 (1988), it suggests that *Unimet* conflicts with *Roth American* and *Ionosphere II*. In *Unimet*, however, the Sixth Circuit never reached the question whether insurance premium payments due under a collective bargaining agreement were classifiable as administrative expenses under the Bankruptcy Code. Instead, the Sixth Circuit merely reasoned that because Section 1113 prohibits a debtor from unilaterally modifying an unrejected collective bargaining agreement, and because the debtor's refusal to comply with the obligations at issue would have been tantamount to a unilateral modification of the agreed-upon terms of that collective bargaining agreement, the

III. REVIEW IS NOT WARRANTED BECAUSE THE COURT OF APPEALS' DECISION DOES NOT REPRESENT A SIGNIFICANT CHANGE IN THE LAW

Adventure's further assertion that the decision of the court of appeals will have drastic consequences also is incorrect. The court of appeals' decision does not represent a change in the law. Rather, the decision merely follows the established treatment of assumption of collective bargaining agreements after *Bildisco* and the subsequent passage of Section 1113. Adventure's assertion that the Fourth Circuit's holding "would hamper the reorganization efforts of chapter 11 debtors with collective bargaining agreements since the debtors would be less likely to obtain new credit" (Pet. 19) mischaracterizes the decision reached by the court of appeals. As explained above, the Fourth Circuit's decision is entirely unremarkable. The court of appeals simply applied basic bankruptcy law to the circumstances presented. The law applied by the court consistently has been the law in bankruptcy proceedings for nearly 100 years.

In support of its argument, Adventure relies on the speculation by the Third Circuit in *Roth American* that a strong disincentive to reorganization would be created if post-petition administrative expenses could be "wiped out by pre-petition employment obligations . . . ." 975 F.2d at 956 (citations omitted). Adventure's argument simply mischaracterizes the effect of the court of appeals' decision here. As explained above, *Roth American* addressed whether Section 1113 of the Bankruptcy Code automatically provides administrative expense priority to claims for vacation and severance pay earned prior to the bankruptcy under an unrejected collective bargaining agreement. In other words, whether Section 1113 of the Bankruptcy Code, standing alone, creates a new class of

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debtor was required to satisfy those obligations unless and until it modified or rejected the agreement under Section 1113 of the Bankruptcy Code. *Id.* at 884.

priority claims in bankruptcy. The Third Circuit decided that it did not.

Unlike *Roth American*, however, the court of appeals in this case decided that the applicable collective bargaining agreement was an executory contract, that the executory contract had been assumed, and that the priority of past-due obligations owed under the 1988 NBCWA therefore is governed under Section 365 of the Bankruptcy Code. The court of appeals merely ruled that Adventure's obligations under the 1988 NBCWA, given the facts of the case, fell into one of the existing and uncontroversial categories of priority claims in bankruptcy. Adventure does not, and cannot, suggest that according administrative expense priority to amounts due under assumed contracts will undermine reorganization efforts. Nearly a century of experience in reorganization cases under the Bankruptcy Act and the Bankruptcy Code teaches that the priority accorded obligations under assumed executory contracts is not a significant deterrent to reorganization. It is, moreover, expressly dictated by Congress in the Bankruptcy Code. 11 U.S.C. § 365.

Similarly, Adventure's argument that the Fourth Circuit's decision "creates a further disparity in the treatment of union and non-union wage and benefit claims," Pet. 19, is without merit. The court of appeals held that Adventure's obligations under the 1988 NBCWA are entitled to administrative priority because it found that the contract between Adventure and the UMWA had been assumed, not because the claimants are pension funds for union retirees.[14] Adventure benefitted from the employment of miners under its collective bargaining agreement, and the court of appeals ruled that Adventure assumed the collective bargaining agreement. Section 365 of the Bankruptcy Code requires Adventure to pay for the benefits

[14] Furthermore, to the extent that any special treatment is accorded collective bargaining agreements, such treatment was specifically directed by Congress when it enacted Section 1113.

it promised in return. Indeed, employment contracts with non-union employees are equally subject to Section 365. Upon assumption of such a contract by Adventure, all pre-petition amounts would be payable as administrative expenses. Rather than seeking fair treatment for non-union employees, petitioner is actually attempting to obtain secondary status for executory contracts that happen to be collective bargaining agreements.

In short, the analysis used by the Fourth Circuit does not establish a new rule of law to be applied in all Chapter 11 bankruptcy cases. The Fourth Circuit simply applied existing, well-settled bankruptcy principles to the circumstances of the Adventure bankruptcy. The court of appeals reached a sensible and supportable conclusion given the facts of the case. Adventure's disagreement with that conclusion does not provide a sufficient ground for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 25, 1998